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What is a Property-Related Fee? An Interpretation of California's Proposition 218

by
JOHN S. THROCKMORTON*

In 1978, the voters of California launched a full-scale assault on the power of local governments to levy taxes on property. In that year, voters passed the revolutionary initiative known as Proposition 13 and incorporated into the California Constitution the principle that the power to tax property should be subject to voter approval. Article XIII A of the California Constitution, as Proposition 13 later became known, was only the beginning of a long term revolt within the state and throughout the nation to control the size of government and protect the taxpayers' pocketbooks. With the passage of Proposition 62 in 1982 and Proposition 218 in 1996, both of which sought to eliminate "loopholes" left open by Proposition 13, California voters continued a trend that aims to bring local government taxing power under the control of voters.

Unfortunately, the initiative process can be a clumsy tool. The tax revolution in California has led to the passage of ambiguous laws that have been difficult to execute. Legislators and judges, faced with the implementation and interpretation of the new constitutional provisions, have had to wrestle with the meaning behind the broad language of the referendums. The recently passed Proposition 218 is no exception. The initiative limits local governments' authority to levy "property-related fees" but fails to adequately define this newly created category of levies. The drafters have placed the burden on the courts and Legislature to define the term.

This Note attempts to provide guidance to define the terms of Proposition 218. It views Proposition 218 as a continuation of the taxpayer revolt begun almost two decades ago. Part I looks at the initiative process and the relative success of efforts to limit local government taxation on property through the passage of Propositions 13, 62 and 218. Part II examines Proposition 13 more closely and specifically looks at how courts have interpreted the ambiguous terms of that referendum. Finally, Part

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III applies the principles of statutory interpretation used in Proposition 13 jurisprudence to illuminate the meaning of Proposition 218.

I. History of the California Tax Initiatives

In the middle of the 1970s, California property owners felt increasing economic pressure resulting from higher property taxes levied by local governments.¹ This was a result not only of increased property values² but also quicker reassessments of properties to reflect this increase in paper wealth.³ This led to homeowners paying increased taxes based on an unrealized gain.⁴ At the same time, the legislature failed to pass any form of tax relief, and the state budget surplus grew to "unprecedented amounts."⁵ Property owners were thus forced to spend an increasing amount of their real income on taxes at a time when tax revenues exceeded the needs of state and local governments.

The proponents of Proposition 13 stated that relief was needed to save millions of homes from foreclosure because of an inability to pay property taxes.⁶ Of particular concern was the threat of senior citizens on fixed incomes being forced to sell their homes⁷ or of first-time homebuyers being unable to assess their ability to purchase property for their families because of the unpredictability of tax levies.⁸ At a time when California state and local government taxes had risen to 15.4% of state personal income, there was a pervasive sense that government spending had spun out of control.⁹ According to a field poll conducted in 1978, "30% [of Californians] volunteered high taxes as one of the most pressing issues in the state or community."¹⁰

1. PROPOSITION 13: A TEN YEAR RETROSPECTIVE 2 (Frederick D. Stocker ed., 1991) (hereinafter TEN YEAR RETROSPECTIVE).

2. See *id.* at 1-2 (citing growth in average household income, increased land use legislation and population growth as factors in increasing the average price of a Southern California house from \$1,100 below the national average in 1973 to \$26,000 above the national average in 1978).

3. See *id.* at 1.

4. See *id.* at 9.

5. See *id.* at 2.

6. JOINT LEGISLATIVE BUDGET COMMITTEE, PROPOSITION 13, TEN YEARS LATER: A REPORT ON THE JOINT LEGISLATIVE BUDGET COMMITTEE'S HEARING OF SEPTEMBER 30, 1987 10-11 (1987) [hereinafter JOINT COMMITTEE REPORT].

7. See *id.* at 10.

8. See *id.* at 11.

9. See *id.* at 39 (statement of Prof. William Craig Stubblebine). Even though the overall tax rate increased dramatically, from approximately 11.3% of state personal income in the 1960s to 15.4% in 1978, the amount of this increase attributable to property taxes was minor in comparison to other state and local taxes. In spite of this, property taxes were the focus of tax reform. *Id.*

10. See *id.* at 3.

Faced with a non-responsive state legislature and an unsympathetic governor,¹¹ property owners turned to the state's voter initiative process to effect change in the state's tax structure. In 1977, Howard Jarvis and Paul Gann circulated the "People's Petition to Control Taxation," an initiative to amend the state Constitution that easily qualified as a proposition on the ballot in June, 1978.¹² This petition appeared on the ballot as Proposition 13 and was approved by 65% of the voters.¹³ When added to the California Constitution as Article XIII A, Proposition 13¹⁴ set into

11. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 2 (stating that then-Governor Jerry Brown saw property tax reform merely as a means of income redistribution).

12. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 2-3. Petitions proposing a constitutional amendment by initiative must be signed by a number of voters equal to 8% of the number of votes cast in the last governor's election. CAL. CONST. art. II, § 8; CAL. ELEC. CODE § 3524 (West 1997).

13. See JOINT COMMITTEE REPORT, *supra* note 6, at 3.

14. The text of Proposition 13 is as follows:

That Article XIII A is added to the Constitution to read:

Section 1.

(a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

Section 2.

(a) The full cash value means the County Assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value," or thereafter, the appraised value of real property when purchased, newly constructed or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 tax levels may be reassessed to reflect that valuation.

(b) The fair market value base may reflect from year to year the inflationary rate not to exceed two percent (2%) for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction.

Section 3.

From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether [sic] by increased rates or changes in methods of computations must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transactions taxes on the sales of real property may be imposed.

Section 4.

Cities, Counties and special districts by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district except ad valorem taxes on real property or a transaction tax on the sale of real property within such City, County or special district.

Section 5.

This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

place numerous limits on local governments' power to levy property taxes,¹⁵ including: (1) limiting real property taxes to one percent of full cash value except as necessary to pay for previously incurred voter-approved debt;¹⁶ (2) requiring property to be valued as of March 1, 1975 or at the date of change of ownership or construction if such date is after March 1, 1975;¹⁷ (3) limiting subsequent annual inflation adjustments to two percent per annum;¹⁸ (4) prohibiting state and local governments from imposing any sales or transaction taxes on the sale of real property;¹⁹ and (5) requiring a two-thirds vote in each house of the Legislature to increase or impose new state taxes and a two-thirds vote of the "qualified electors" to increase or add new local special-purpose taxes.²⁰

The passage of Proposition 13 represented the first of many victories in California for advocates of limitations on local government taxing powers. One year later, in 1979, California voters passed Proposition 4 by 74% of the vote.²¹ Proposition 4 turned the voters' focus away from the revenue-raising aspect of state and local tax structures, and instead addressed the spending aspect of the taxation power of local government by imposing spending caps "for [virtually] every unit of California state and local government."²² The referendum limited appropriations by state and local governments from taxes and state subventions to local governments to that entity's appropriations limit from the prior year, adjusted for shifts in population and inflation.²³ Proposition 4 specifically exempted appropriations for new state-mandated programs or higher levels of service from this limitation.²⁴ Proposition 4 was seen by many as a sequel to Proposition 13.²⁵ These initiatives were the "culmination of a taxpayer revolt," the central theme of which was that "elected represen-

Section 6.

If any section, part, clause or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

TEN YEAR RETROSPECTIVE, *supra* note 1, app. B at 200-01 (emphasis omitted).

15. See generally TEN YEAR RETROSPECTIVE, *supra* note 1, at 3; app. B (CAL. CONST. art. XIII A).

16. CAL. CONST. art. XIII A, § 1.

17. CAL. CONST. art. XIII A, § 2.

18. CAL. CONST. art. XIII A, § 2(b).

19. CAL. CONST. art. XIII A, §§ 3-4.

20. *Id.*

21. See JOINT COMMITTEE REPORT, *supra* note 6, at 3.

22. *Id.* at 39 (statement of Prof. Stubblebine).

23. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 3. See also CAL. CONST. art. XIII B.

24. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 3.

25. See JOINT COMMITTEE REPORT, *supra* note 6, at 39 (statement of Prof. Stubblebine).

tatives were approving more spending and more taxes than the body politic was prepared to tolerate."²⁶

Proposition 13 had a tremendous effect on the subsequent tax revenues in California. Between 1977 and 1986, the percentage distribution of revenue attributable to property taxes declined by 38.2% for California cities and 28.1% for California counties.²⁷ In response to the decrease in income from property taxes, local governments shifted their revenue sources, primarily to other taxes and fees not subject to the supermajority voter requirements of Proposition 13.²⁸ During the ten years following the passage of Proposition 13, the percentage distribution of revenues attributable to other taxes rose 62.4% for California cities, while that portion attributable to fees increased by 36.2%.²⁹ In California counties during the same time period, the shift was less stark, with a 7.6% increase in fees and a decline in the percentage change of other taxes of 6.3%.³⁰

Existing special districts experienced a marked shift in their revenue structures from dependence on property taxes to other sources of revenue.³¹ In addition, after 1978, the state legislature expanded the scope of services that a benefit assessment district could provide.³² California

26. *Id.*

27. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 17-18. In fiscal year 1977-78, property taxes represented 21.7% of revenues in cities and 33.1% of revenues in counties, while in fiscal year 1985-86, they represented 13.4% and 23.8%, respectively. *Id.*

28. See generally *id.* at 15-20 (describing the shift in revenue-raising from property taxes to other taxes and fees); see also Julie K. Koyama, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 PAC. L. J. 1333, 1334 (1991) ("Increasingly, municipalities have responded to the harsh fiscal effect caused by the taxing restrictions of Proposition 13 by turning to nontaxing revenue sources not subject to the provisions of the amendment").

29. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 17. In fiscal year 1977-78, "other taxes" represented 10.1% of California city revenues, while in 1985-86 they represented 16.4%. In fiscal year 1977-78, fees represented 15.2% of California city revenues, while in 1985-86 they represented 20.7%. *Id.*

30. *Id.* at 18. In fiscal year 1977-78, "other taxes" represented 3.2% of California county revenues, while in 1985-86 they represented 3.0%. In fiscal year 1977-78, "fees" represented 10.5% of county revenues, while in 1985-86 "fees" represented 11.3%. Much of the change in county revenue structure was due to the increasing importance of state aid, which rose from 23.8% of county revenues in fiscal year 1977-78 to 36.1% in fiscal year 1985-86. *Id.*

31. *Id.* at 79-80. In fiscal year 1977-78, "fees" accounted for 40.41% of revenue for enterprise special districts, while in 1985-86 "fees" represented 54.91%—a growth of over 33%. In fiscal year 1977-78, "fees" accounted for 7.21% of revenue for non-enterprise special districts, while in 1985-86 "fees" represented 23.92%—more than tripling in ten years. *Id.*

32. *Id.* at 23-24. The first special assessment districts were authorized in the 1909 Park and Playground Act, with later authorizations for parking, shopping malls and lighting. See *id.* at 23. Legislation after 1978 allowed the creation of special districts for fire suppression, vector (pest) control, and rapid transit improvements. See *id.* at 23-24. There are presently "an extensive number of authorizations for creating districts and levying assessments for other im

courts specifically characterized such special assessment as "not a tax at all" and thus exempted it from the provisions of Proposition 13 requiring a supermajority.³³ The result was "an explosive growth in the use of benefit assessment districts."³⁴ The number of bond issues more than quintupled from 1982 to 1986.³⁵ During the same time period, the monetary value of those bonds rose from \$67.3 million to \$1,153.2 million.³⁶

Overall, local governments raised thousands of existing taxes and fees and implemented hundreds of new charges.³⁷ Local governments tailored these new revenue sources to avoid the status of "special tax."³⁸ By changing their revenue structures, local governments circumvented the electoral oversight provisions of Proposition 13 by increasing the portion of their revenue not subject to supermajority voter approval.

One of the reasons for the rapid growth in taxes and fees was the restrictive application of Proposition 13 by the California courts in the 1980s.³⁹ In *City and County of San Francisco v. Farrell*,⁴⁰ for example, the California Supreme Court attempted to define the boundaries of a "special tax" which, under the provisions of Proposition 13, would require a two-thirds vote of the electorate.⁴¹ The court used a strict construction and construed the terms of Proposition 13 narrowly.⁴² That allowed local governments to replace the general revenues lost to them by Proposition 13's limitation on real property taxes with new taxes adopted by a bare majority of voters, rather than by a two-thirds majority vote.⁴³ Local governments seized upon the *Farrell* decision and substantially raised the rate of taxes used for such assertedly general purposes. Cali-

provements." Marc N. Melnick, *New Avenue for Special Assessment Financing*, 25 URB. LAW. 539, 542 (1993).

33. See Melnick, *supra* note 32, at 545. See also *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 983-84 (1979).

34. TEN YEAR RETROSPECTIVE, *supra* note 1, at 24.

35. See *id.* at 25. The number of bond issues rose from 33 in 1982 to 190 in 1986. *Id.*

36. See *id.*

37. See *id.* at 16-17.

38. See Koyama, *supra* note 28, at 1334-35. See also Melnick, *supra* note 32, at 545-46.

39. See Koyama, *supra* note 28, at 1341 ("It has been the courts [that] have taken an active role in moderating the harsh fiscal impact of Proposition 13"). See generally *id.* at 1350-68 (describing California cases strictly applying the provisions of Proposition 13).

40. 32 Cal. 3d 47 (1982).

41. See *id.* at 53-57. See also discussion *infra*, notes 41-42 and accompanying text.

42. See *id.* at 57. The court defined the term "special taxes" to mean "taxes which are levied for a specific purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes." *Id.* A dissent argued for a broader interpretation based on legislative intent. *Id.* at 57-58 (Richardson, J., dissenting). See generally *infra*, Part II.

43. See *Farrell*, 32 Cal. 3d. at 57 (Richardson, J., dissenting). See generally *infra*, Part II.

fornia utility users' tax rates soared 58% in the two years following the decision.⁴⁴ California business license tax collections rose 33% during the same time period.⁴⁵ The Court essentially found a loophole in Proposition 13 that allowed local governments to circumvent sections 3 and 4 of Article XIII A, provisions that require voter approval of special taxes.⁴⁶ As Howard Jarvis, the co-author of Proposition 13, said, "In 1978, Proposition 13 returned the power to control tax increases to the people, where it belongs. However, the State Supreme Court twisted the language of Proposition 13 . . . [and] took away your right to vote on city and county tax increases."⁴⁷

Proposition 62, a statutory initiative⁴⁸ passed by the voters of California in 1986, attempted to close the loophole created by the *Farrell* decision. Proposition 62 defined all taxes as either general taxes or special taxes "imposed for specific purposes."⁴⁹ Proposition 62 allows local governments and districts to impose a general tax if (1) it is submitted to the electorate and (2) it is approved by a majority of the electorate.⁵⁰ The proponents of Proposition 62 argued that the initiative would simply return "rights the State Supreme Court took away from us, [that] we [Californians] won with Proposition 13."⁵¹

While Proposition 62 successfully closed the general tax loophole to Proposition 13, yet another alternative existed to raise local government revenues without triggering voter approval requirements—increasing assessments, fees and other nontaxing levies. After Proposition 13, assessments and fees represented an increasing proportion of revenue for local governments.⁵² These included zoning and subdivision fees, police and fire department charges, plan and map fees, animal shelter fees, engineering fees, street, sidewalk and curb repair fees, weed and lot clearing charges, first aid and ambulance fees, library fines and fees, parks,

44. See *Farrell*, 32 Cal. 3d. at 57 (Richardson, J., dissenting). Utility users' tax collections rose approximately \$365 million from fiscal year 1982-83 to fiscal year 1984-85.

45. See *Farrell*, 32 Cal. 3d. at 59. Business license tax collections rose from approximately \$270 million in fiscal year 1982-83 to approximately \$360 million in fiscal year 1984-85.

46. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 4; see also CAL. CONST. art. XIII A, §§ 3-4.

47. CAL. STATE VOTER PAMPHLET 42 (Nov. 1992).

48. Unlike Propositions 4, 13 and 218, which were all constitutional initiatives, Proposition 62 was a statutory initiative. The primary legal difference between the two types of initiatives is that a statutory initiative must conform to the Constitution, whereas a constitutional initiative amends the Constitution. SENATE REVENUE AND TAXATION COMMITTEE, PROPOSITION 62: ANALYSIS OF ISSUES AND PROVISIONS 8 (1986).

49. CAL. GOV'T. CODE § 53721 (West 1997).

50. See CAL. GOV'T. CODE § 53723 (West 1997).

51. CAL. STATE VOTER PAMPHLET 43 (Nov. 1992).

52. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 17-18.

and recreation and golf fees, among others.⁵³ By 1982, a sampling of nineteen large cities (population over 100,000) found that almost 75% of fees were raised from pre-Proposition 13 levels.⁵⁴ Smaller cities (population less than 100,000) raised almost two-thirds of their user charges.⁵⁵ Counties also raised the majority of their fees.⁵⁶ In addition, hundreds of new charges were implemented by counties to supplement government revenues.⁵⁷ Increases were not evenly spread, and charges between jurisdictions in many cases were out of proportion to one another.⁵⁸ The growth in both the quantity and size of fees continued unabated into the 1990s.⁵⁹

Proponents of Proposition 218 viewed the growth of fees and assessments as yet another attempt to circumvent voter supervision of government revenue growth. "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling them 'assessments' and 'fees.'"⁶⁰ Proposition 218, passed by the voters on November 5, 1996, amended Article XIII C and added Article XIII D to the California Constitution.⁶¹ The Proposition specifically mandates that all general taxes imposed, extended or increased after January 1, 1995, be submitted to the electorate for approval by a majority vote within two years of the passage of Proposition 218.⁶² In addition, all assessments not previously approved by voters,⁶³ not pledged for bond repayment,⁶⁴ or not specifically exempted⁶⁵ must be examined for compliance with Proposition 218.⁶⁶ In order for an assessment to comply, the local government must first determine that the property subject to the assessment derives a special benefit from the project or service financed by the assessment.⁶⁷ Second, the amount of special benefit each assessed parcel derives from the project must be determined

53. See *id.* at 20.

54. See *id.* at 16.

55. See *id.*

56. See *id.* at 18.

57. See *id.*

58. See *id.* at 19.

59. See generally Koyama, *supra* note 28, at 1359-63 (discussing government regulatory and service fees).

60. CAL. STATE VOTER PAMPHLET 76 (Nov. 1996).

61. See CAL. CONST. art. XIII C, XIII D.

62. See CAL. CONST. art. XIII C, § 2(b)-(c).

63. See CAL. CONST. art. XIII D, § 5(b).

64. See CAL. CONST. art. XIII D, § 5(c).

65. See CAL. CONST. art. XIII D, § 5(a). This section specifically exempts "any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems or vector [mosquito] control." *Id.*

66. See Proposition 218 § 4; CAL. CONST. art. XIII D, § 5.

67. See CAL. CONST. art. XIII D, § 4(a).

by an engineer.⁶⁸ Third, local governments may assess properties only up to the reasonable cost of the proportional special benefit conferred on that parcel.⁶⁹ For any new assessments, local governments must mail information relating to the proposed assessment, along with a mail-in ballot, to the owner of each parcel affected by the proposed assessment.⁷⁰ Within 45 days after the mailing of notices, the local government entity must hold a public hearing at which time the ballots, weighted in proportion to the amount of the assessment each property owner would pay, are tabulated.⁷¹ A majority of the weighted votes must approve any proposed assessment before it may be imposed.⁷²

Section 6 of Proposition 218 [hereinafter "section 6"] also limits governmental authority to impose "property-related fees and charges."⁷³ Section 6 mandates that local governments determine whether a fee is "property-related."⁷⁴ If a fee is not property-related, no further action may be undertaken under this provision. However, if a fee is property-related, then the local government must ensure compliance with Proposition 218.⁷⁵ No property-related fee or charge may be imposed to pay for a general government service,⁷⁶ for a service not used by or immediately available to the property owner,⁷⁷ or for financing programs unrelated to the property-related service.⁷⁸ A new property-related fee or charge must be submitted for voter approval and passed by either by a majority of the owners with property subject to the fee or charge, or by a two-thirds vote of the electorate residing in the affected area.⁷⁹ Property-related fees or charges may then be imposed only to the extent of the proportionate cost to provide the property-related service to the charged parcel.⁸⁰ Section 6 thus expands the requirement of voter approval over a broad range of government levies. This provision, reminiscent of similar voter approval requirements mandated by Proposition 13, further restricts the ability of local governments to raise revenue without popular support.

While the provisions of Proposition 218 relating to the validity of an assessment or fee are quite detailed, section 6 suffers from several weaknesses in its drafting. One of the primary difficulties in interpreting sec-

68. See CAL. CONST. art. XIII D, § 4(b).

69. See CAL. CONST. art. XIII D, § 4(a).

70. See CAL. CONST. art. XIII D, § 4(c)-(d).

71. See CAL. CONST. art. XIII D, § 4(e).

72. See *id.*

73. See CAL. CONST. art. XIII D, § 6.

74. See generally ELIZABETH G. HILL, UNDERSTANDING PROPOSITION 218 28 (1996).

75. See CAL. CONST. art. XIII D, § 6.

76. See CAL. CONST. art. XIII D, § 6(b)(5).

77. See CAL. CONST. art. XIII D, § 6(b)(4).

78. See CAL. CONST. art. XIII D, § 6(b)(2).

79. See CAL. CONST. art. XIII D, § 6(c).

80. See CAL. CONST. art. XIII D, § 6(b)(3).

tion 6 is the ambiguity of its terms, specifically the meaning of the phrase "property-related fee or charge." This phrase was created by the drafters of Proposition 218 specifically for that provision and has not been previously defined by the courts or legislature. The drafters themselves did not clearly define the term within the provisions of Proposition 218 or any supporting materials. As the legislative analyst stated, "Proposition 218 restricts property-related fees, defined as fees imposed 'as an incident of property ownership.'" ⁸¹ At this time, there is no consensus as to which fees meet this definition. ⁸² This is a major flaw, since the application of the law is determined by such definition. The importance of clearly defining this term "will be an important and sensitive issue for the Legislature and the courts." ⁸²

California courts have taken an active role in examining the terms of California's tax initiatives. ⁸³ This has been true because Proposition 13 did not include a provision for legislative amendment, and without a grant of authority in the text of the law, the California State Legislature is prevented by the California Constitution from substantially amending or repealing the law. ⁸⁴ Also, the California Supreme Court established that legislative and administrative interpretation of such initiatives is subject to judicial review. ⁸⁵ The remainder of this Note examines how the ambiguous provisions of Proposition 218, specifically those relating to "property-related fees and charges," may be interpreted using the analyses developed by the California Supreme Court in its examination of Proposition 13. Part II contends that the court has applied two rules when interpreting the state constitutional initiatives, one narrow and one broad, both of which remain valid law. Part III proposes an argument for the application of a broader construction to the terms of Proposition 218. Finally, Part IV offers a definition of the currently undefined terms of section 6 that seeks to fulfill the intent of the drafters of the provision.

II. Proposition 13 Jurisprudence

Proposition 13 spawned a great deal of litigation. By mid-1985 alone, Proposition 13 had been at the center of more than eighty-one court cases, fifty-six new statutes and resolutions, twenty-one attorney

81. HILL, *supra* note 74, at 18.

82. *Id.* at 19.

83. See Koyama, *supra* note 28, at 1341.

84. CAL. CONST. art. II, § 10(c) ("The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval").

85. Amador Valley Joint Unified Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 247 (1978).

generals' opinions, eleven legislative counsels' opinions and eight amendments at state-wide elections relating to the definition and implementation of the new law.⁸⁶ This "exciting legal life" was the direct result of the "murky drafting of the initiative."⁸⁷

In *Amador Valley Joint Union High School District v. State Board of Equalization*, the California Supreme Court for the first time directly addressed the issue of ambiguity in the drafting of Proposition 13.⁸⁸ Plaintiffs in that case sought declaratory judgment concerning the constitutionality of Proposition 13.⁸⁹ As part of a broad attack on the initiative, plaintiffs asserted that "several words and phrases in Article XIII A . . . are ambiguous or uncertain" and suggested that "in its totality the new article is so vague as to be incapable of a rational and uniform interpretation and implementation."⁹⁰ Plaintiffs argued that the terms of the new law had to be sufficiently clear "so as to provide adequate notice of prohibited conduct."⁹¹ While the Supreme Court acknowledged imprecision and ambiguity in a number of the particulars of Article XIII A, it concluded in *Amador Valley* that the amendment was not "so vague as to be unenforceable"⁹² and found Proposition 13 valid under the California State and Federal Constitutions.⁹³

In upholding the validity of Proposition 13, the Supreme Court established rules for interpreting the ambiguous provisions of the initiative. The Court stated that Article XIII A should be clarified "in accordance with several . . . generally accepted rules of construction used in interpreting similar enactments."⁹⁴ The decision set forth the following framework to give meaning to the terms of the law: First, constitutional enactments must receive a "liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people."⁹⁵ The Court next provided that a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words—but allowed that even a literal interpretation of the enactment's terms "may be disregarded to avoid absurd results and to fulfill the intent of the framers."⁹⁶ The Court further stated that "apparent ambiguities

86. See TEN YEAR RETROSPECTIVE, *supra* note 1, at 4.

87. *Id.*

88. See 22 Cal. 3d at 208.

89. See *id.* at 219.

90. *Id.* at 244.

91. *Id.*

92. *Id.* at 245.

93. *Id.* The United States Supreme Court also accepted the constitutionality of Proposition 13 in *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (no violation of the Equal Protection Clause).

94. *Amador Valley*, 22 Cal. 3d at 245.

95. *Id.* (citing *Los Angeles Metro. Transp. Auth. v. Pub. Util. Comm'n*, 59 Cal. 2d 863, 869 (1963)) (internal quotation marks omitted).

96. *Id.*

frequently may be resolved by the contemporaneous construction of the Legislature or of the administrative agencies charged with implementing the new enactment."⁹⁷ Finally, the Court concluded that where "the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language."⁹⁸ The Supreme Court affirmed that the goal of statutory interpretation was "to carry into practical effect the collective will of a . . . majority of our citizens."⁹⁹

In *Los Angeles County Transportation Commission v. Richmond*,¹⁰⁰ the California Supreme Court attempted to give meaning to the terms of section 4 of Article XIII A [hereinafter "section 4"]. In that case, the Los Angeles County Transportation Commission ("LACTC") enacted a sales tax that was approved by 54% of the voters of Los Angeles County in 1980.¹⁰¹ The LACTC's own executive director, George Richmond, refused to implement the tax because it had not received a two-thirds vote that he claimed was required by section 4.¹⁰² The LACTC brought action to compel Richmond to implement the tax.¹⁰³

The Court began its analysis by noting that "[n]owhere is [the] imprecision [of Article XIII A] more evident than in the language of section 4."¹⁰⁴ That imprecision extended to the definition of "special districts" that were authorized by that section to levy "special taxes."¹⁰⁵ In particular, the term "special district," while not a novel term, had been defined in various ways in various contexts.¹⁰⁶ The Court thus had to consider "which of [the] various definitions [was] appropriate in the context of section 4."¹⁰⁷

In *Richmond*, a plurality of the Court narrowed *Amador Valley*'s rule of statutory interpretation.¹⁰⁸ Because of the fundamentally undemocratic nature of the two-thirds majority vote requirement that applied to special taxes under Proposition 13, the Court considered it "appropriate to consider the substance and effect of the extraordinary majority re-

97. *Id.*

98. *Id.* at 245-46.

99. *Id.* at 247.

100. 31 Cal. 3d 197 (1982) (plurality opinion).

101. *See id.* at 200.

102. *See id.*

103. *See id.*

104. *Id.* at 201.

105. *See id.* at 201-02.

106. *See id.* at 202.

107. *Id.*

108. 31 Cal. 3d at 203-05; for a discussion of *Amador Valley*, see *supra* text accompanying notes 88-89.

quirement.”¹⁰⁹ In addition, the Court stated that the “subject of the two-thirds limitation is also of consequence.”¹¹⁰ The Court was concerned that a minority of voters in a local district would be able to constrain the power of government to raise taxes that in no way threatened the fundamental individual rights of that minority.¹¹¹ The tax at issue in *Richmond* was a broad-based tax on consumers that had no relation to property ownership, did not increase the indebtedness of LACTC, and could be repealed by a majority vote.¹¹² Thus, the Court held that, contrary to the liberal, practical common sense construction espoused in *Amador Valley*, the “language of section 4 must be *strictly construed* and ambiguities resolved in favor of permitting voters of cities, counties and ‘special districts’ to enact ‘special taxes’ by a majority rather than a two-thirds vote.”¹¹³ The Court then looked at the language of section 4,¹¹⁴ the material set forth in the voter’s pamphlet,¹¹⁵ and the interpretation of the state legislature.¹¹⁶ The *Richmond* plurality opinion found that the intention of the voters to impose a two-thirds vote requirement on the tax implemented by LACTC was not clear, and thus the majority voter approval received was sufficient to uphold its validity.¹¹⁷

Justice Richardson wrote a dissenting opinion, arguing for a more flexible interpretation of the ambiguities of section 4 based on the liberal construction rule set forth in *Amador Valley*.¹¹⁸ The dissent focused on the function of the tax in question, viewing it as a replacement for real property tax revenues affected by other provisions of Proposition 13.¹¹⁹ Justice Richardson did not apply a precise meaning to the terms of section 4, but rather stated that any tax whose purpose was to defeat the object of Proposition 13 must necessarily be subject to the limits of Proposition 13, even if not explicitly included in the provisions of Proposition 13.¹²⁰ Justice Richardson stressed that the terms of Proposition 13 must be read in a “broad and comprehensive manner” if the law were to achieve its pur-

109. 31 Cal. 3d at 203-04.

110. *Id.* at 204.

111. *See id.* at 204-05.

112. *Id.* at 205.

113. 31 Cal. 3d at 205 (emphasis added); *see also id.* at 210 (Richardson, J., dissenting) (stating that majority applied interpretive rule of strict construction of constitutional language).

114. *See id.* at 205.

115. *See id.* at 205-06.

116. *See id.* at 206-07.

117. *See id.* at 208. Justice Broussard and Chief Justice Bird concurred in the decision. Justice Kaus filed a separate concurrence in which Justice Newman joined, focusing on the description and discussion of the provision in the election pamphlet. *Id.* at 208-09 (Kaus, J., concurring).

118. *See id.* at 210-11 (Richardson, J., dissenting).

119. *See id.* at 212-13.

120. *See id.* at 215.

pose of providing property owners with effective tax relief.¹²¹ Justice Richardson's dissent thus gave support to a dynamic interpretation of the terms of Proposition 13, one that would take into account not only the intent of the initiative's framers, but also the intent of local governments and agencies responding to the limits of the constitutional provisions.¹²²

Shortly after its decision in *Richmond*, the California Supreme Court decided *City and County of San Francisco v. Farrell*.¹²³ The facts of this case were similar to those of *Richmond*. On April 1, 1980, the City and County of San Francisco increased a business tax on payrolls and gross receipts, the monies of which were added to the general fund.¹²⁴ In 1980, 55% of San Francisco voters approved an extension of the increase.¹²⁵ The mayor of San Francisco later approved a supplemental appropriation of funds of the tax from the general fund to improve the municipally-owned Laguna Honda Hospital.¹²⁶ John C. Farrell, San Francisco's controller, refused to certify the availability of the funds, asserting that the tax was a "special tax" and as such required approval by a two-thirds vote of the electorate.¹²⁷ The issue before the Court was whether the extension of the increase was a "special tax" under section 4.¹²⁸

The court found that "[t]here can be no doubt that the term 'special taxes' is ambiguous in the sense that it has been interpreted to mean different things in different contexts."¹²⁹ In giving meaning to the term, the court applied *Richmond*'s strict construction test.¹³⁰ The court gave only passing attention to the intention of the drafters of Proposition 13.¹³¹ Instead, the court looked at the language of the provision,¹³² the material

121. See *id.* at 217.

122. Interestingly, the plurality opinion lends some support to a dynamic, intent-based rule of interpretation of section 4. In dicta, the opinion stated that the court could "deal with" any legislative avoidance of the goals of Proposition 13 "if and when the issue arises." See *id.* at 208. Implicitly, then, the plurality did not see the facts of *Richmond* as a case of legislative avoidance, so that the court's new rule of strict interpretation arguably would not apply where such facts were shown.

123. 32 Cal. 3d 47 (1982).

124. See *id.* at 51.

125. See *id.*

126. See *id.*

127. See *id.* The court in *Farrell* had failed to reach the issue of "special taxes" because the issue was obviated by their finding that LACTC was not a "special district." 31 Cal. 3d at 201-202. In *Farrell*, the City and County of San Francisco came within the purview of section 4. See CAL. CONST. art. XIII A § 4 ("Cities, Counties and special districts . . . may impose special taxes.").

128. CAL. CONST. art. XIII A § 4; *Farrell*, 32 Cal. 3d at 50-51.

129. *Farrell*, 32 Cal. 3d at 53.

130. See *id.* at 52-3.

131. See *id.* at 54-5.

132. See *id.* at 54.

presented to voters in the ballot pamphlet,¹³³ and finally to legislative interpretation.¹³⁴ The court found neither the election materials nor the legislative interpretation provided authoritative guidance to the meaning of “special taxes.”¹³⁵ The court thus based its interpretation on the “common meaning of the term” and gave the term a strict definition that included only taxes levied for a specific purpose.¹³⁶

In 1992, the California Supreme Court revisited the meaning of the term “special taxes” in *Rider v. County of San Diego*.¹³⁷ In that case, the Court reviewed the validity of a tax “enacted for the apparent purpose of avoiding the supermajority voter approval requirement imposed by [Proposition 13] with respect to ‘only special taxes’ sought to be imposed by ‘cities, counties and special districts.’”¹³⁸ The case involved a sales tax of one-half of one percent levied by the San Diego County Regional Justice Facility Financing Agency [the “Financing Agency”].¹³⁹ The San Diego County Board of Supervisors submitted a similar tax to the voters of San Diego County in 1985 for the purpose of obtaining additional funds for justice facilities, but it gathered only 51% of the votes and failed because of the two-thirds requirement applied to such special taxes under section 4.¹⁴⁰ In 1988, the tax was restructured as a general tax, levied by the Financing Agency, which itself had been created specifically for the purpose of financing the construction of justice facilities for San Diego County.¹⁴¹ The measure garnered the support of a simple majority of votes cast and passed as a general tax, albeit one with a specific purpose.¹⁴²

In invalidating the tax, the trial court found that the taxation scheme was a deliberate attempt to circumvent the supermajority approval requirement of section 4.¹⁴³ The court of appeal agreed with this finding of

133. *See id.*

134. *See id.* at 55.

135. *See id.*

136. *Id.* at 57. Justice Richardson filed a dissent that reiterated his objection to the use of the strict construction standard first voiced in his *Richmond* dissent. *See id.* at 57-8 (Richardson, J., dissenting) (calling the majority’s decision a “hole . . . cut in that protective fence which the people of California thought they had constructed around their collective purse by the adoption of Article XIII A.”). Justice Kaus also filed a dissent, in which he pointed to the odd result of the majority’s opinion that general taxes could be raised without limit, while only the much less common “special purpose taxes” were subject to the section 4 supermajority provision. *Id.* at 58-59 (Kaus, J., dissenting).

137. 1 Cal. 4th 1 (1991).

138. *Id.* at 5.

139. *See id.* at 5-6.

140. *See id.* at 9.

141. *See id.* at 5.

142. *See id.* at 5-6. The tax passed with 50.8% of the vote. *See id.* at 6.

143. *See id.* at 6.

fact.¹⁴⁴ Nevertheless, the appellate court felt bound by the *Richmond* decision and ignored the Legislature's dubious intent as it overturned the trial court. Instead, the court of appeal held that the Financing Agency did not come within a literal interpretation of the term "special district" and thus section 4 did not apply.¹⁴⁵

The California Supreme Court seized upon the facts of *Rider* as an opportunity to address the issue of legislative avoidance of Proposition 13. The court revisited some of the same ground covered in the *Richmond* and *Farrell* decisions, but referred approvingly to Justice Richardson's dissents in those cases.¹⁴⁶ Noting the ample evidence that the revenue scheme at issue in the instant case was created to purposefully circumvent the voter approval provisions of Proposition 13, the court refocused its attention on the "probable intent" of the framers of Proposition 13.¹⁴⁷ The court based its interpretation of section 4 on its own understanding of what the framers and voters would have wanted had they been able to foresee the response of local governments to the restrictions of that provision.¹⁴⁸ Because the dynamics of revenue raising were not foreseeable and thus were not adequately addressed by the drafters of section 4, the court based its decision on mere speculation as to their intent.¹⁴⁹

Noting that Proposition 13 was intended to restrict the ability of local governments to impose new taxes to replace property tax revenues lost under the other provisions of that measure, the court held that the term "'special district' would include any local taxing agency created to raise funds for city or county purposes to replace revenues lost by reason of the restrictions of Proposition 13."¹⁵⁰ The court failed to clearly define the parameters of the term "special tax," but concluded again that it must

144. See *id.* ("the [Financing] Agency is nothing more than an empty shell through which the Board of Supervisors of the County of San Diego can exercise its discretion.")

145. See *id.*

146. See *id.* at 11.

147. *Id.* at 10-11.

148. See *id.* at 11 ("In our view, the framers of Proposition 13, and the voters who adopted it, would not have intended [legislative circumvention.]") (emphasis added).

149. In a vigorous dissent, Justice Mosk noted, "[T]he majority attempts to justify [its] result on the ground of vague 'probable intent' of the framers and electorate that approved Proposition 13. But the opinion omits mention of any evidence proffered by the parties to demonstrate the voters' intent and relies, instead, on nothing more than a statement expressed in a rejected dissenting opinion signed by a single justice in Richmond almost a decade ago." *Id.* at 28 (Mosk, J., dissenting) (citations omitted).

150. *Id.* at 11. The court then went on to develop an "essential control" standard to determine whether or not a local taxing agency is included in the definition of "special district." *Id.* at 11-12. The court held that it may be inferred that such intent exists when a plaintiff "has proved the new tax agency is essentially controlled by one or more cities or counties that otherwise would have had to comply with the supermajority provision of section 4." *Id.* at 11.

include any tax created to defeat the purpose of Proposition 13.¹⁵¹ Instead of defining the term, the court defined the circumstances under which a tax, valid under a strict reading of the law, would be invalid. This was an explicit rejection of *Farrell* and *Richmond*¹⁵² and established a more liberal intent-based standard of interpretation that added changed circumstances to the analysis.

In *Santa Clara County Local Transportation Authority v. Guardino*,¹⁵³ the California Supreme Court affirmed the rule that political dynamics and institutional change were relevant to an analysis under the *Rider* rule. The facts of the case were similar to those of *Rider*.¹⁵⁴ The issue in *Guardino*, however, was whether the provisions of Proposition 62 applied to a tax that was "virtually identical to [the tax at issue in] *Rider* with respect to the narrowness of [its] purpose."¹⁵⁵ In examining Proposition 62 in the context of the tax reform initiative movement, the court echoed Justice Holmes' sentiment that "a page of history is worth a volume of logic."¹⁵⁶ The court noted: "Given the evident intent of the drafters of Proposition 62 to close by legislation what they perceived were court-made 'loopholes' in Proposition 13, it is unreasonable to believe they would have chosen to leave the *Richmond* 'loophole' open"¹⁵⁷ The court therefore expanded the terms of Proposition 62 to include levies that would defeat the purpose of Proposition 62.¹⁵⁸

Neither the *Rider* or *Guardino* decisions indicated the extent to which the *Rider* rule limited the *Richmond* and *Farrell* decisions. Critics have differed. Some commentators saw *Rider* as a "departure" from

151. See *id.* at 15 (stating that the "statute at issue was undoubtedly drafted with section 4 and Farrell's holding firmly in mind.") (citation omitted). Justice George concurred in the opinion, stating that the constitutional issues associated with Proposition 13 need not have been addressed because the tax was invalid under California Government Code sections 53720-30, added by Proposition 62. See *id.* at 16-25 (George, J., concurring). Justice Mosk dissented, arguing that the majority ignored standard statutory interpretation principles and relied on a definition of the drafters' probable intent that was not supported by the evidence. See *id.* at 27-28 (Mosk, J., dissenting). Justice Kennard filed a separate dissent, agreeing with Justice Mosk and stating that the majority's definition was overbroad. See *id.* at 35 (Kennard, J., dissenting).

152. See *id.* at 14.

153. 11 Cal. 4th 220 (1995).

154. In June 1992, the Board of Supervisors of Santa Clara County, acting under the authority of the Local Transportation Authority and Improvement Act, created the Santa Clara Local Transportation Authority [the "SCLTA"]. In July 1992, the SCLTA adopted an ordinance that imposed a county-wide sales tax of one-half of one percent for twenty years and empowered the SCLTA to issue bonds payable out of the revenue from this tax. In November 1992, the ordinance was proved by 54.1% of the voters. See *id.* at 227-28.

155. *Id.* at 232 (emphasis in original).

156. *Id.* at 235 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

157. *Id.*

158. *Id.* (noting that petitioner's reading of Proposition 62 would create an exception that would swallow the rule).

precedent.¹⁵⁹ Others went so far as to say that both *Richmond* and *Farrell* were discarded by the new ruling,¹⁶⁰ and that *Rider* heralded a return to an application of *Amador Valley*'s liberal construction principles to the provisions of Proposition 13, beyond the facts of that case. Lower courts have given the most limited interpretation, and continue to apply a strict construction in cases interpreting the terms of Article XIII A, section 4.¹⁶¹ For example, in *Neecke*, the court stated that, "[T]he language and logic of *Rider*, as well as the subsequent cases construing it, support the conclusion that the *Farrell* definition of a special tax was limited, rather than overruled, by *Rider* *Farrell* remains viable in cases . . . where a tax is levied by a general purpose agency and the proceeds are deposited into its general fund"¹⁶² Such a reading is consistent with the *Rider* majority's assertion that the decision represented a "reasonable interpretation of section 4, consistent with *Farrell*'s guidelines."¹⁶³ A fair reading of *Rider*, then, is that "it simply carved out an exception to the 'general funds rule' set forth in *Farrell*."¹⁶⁴

Thus, both the strict *Richmond/Farrell* rule and the more liberal *Rider* rule still stand as good law today. Under the *Richmond/Farrell* rule of construction, where a constitutional initiative imposes a supermajority vote requirement on local government levies, and where the intent of the framers is ambiguous, courts must apply a strict construction to the terms of the law.¹⁶⁵ On the other hand, the *Rider* rule allows courts to interpret the meaning of such laws with the framers' "probable intent" in mind.¹⁶⁶

III. Interpreting Proposition 218

On November 6, 1996, California voters further limited the revenue-raising powers of local governments by passing the "Right to Vote on

159. Dean Thomas Triggs, *California Supreme Court Survey: October 1991-December 1991*, 19 PEPP. L. REV. 1545, 1601-02 (1992) (viewing *Rider* as a "departure from *Richmond*").

160. Note, *Rider v. County of San Diego: "Special Districts" and "Special Taxes" Under Proposition 13*, 29 SAN DIEGO L. REV. 829, 844-45, 848 (1992).

161. See, e.g., *Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 958 (1995) (invalidating a municipal services tax under a *Farrell* analysis); *Brydon v. East Bay Mun. Util. Dist.*, 24 Cal. App. 4th 178, 190-191 (1995) (limiting *Rider* to cases of legislative circumvention); *Fisher v. County of Alameda*, 20 Cal. App. 4th 120, 124 (1993) (applying *Farrell* to a real estate transfer tax).

162. *Neecke*, 39 Cal. App. 4th at 959.

163. *Rider*, 1 Cal. 4th at 15 (citation omitted).

164. *Neecke*, 39 Cal. App. 4th at 956.

165. *Farrell*, 32 Cal. 3d at 56-57.

166. *Rider*, 1 Cal. 4th at 15.

Taxes Act," also known as Proposition 218.¹⁶⁷ The provision in part imposed election requirements on taxes,¹⁶⁸ assessments,¹⁶⁹ and "property-related fees and charges."¹⁷⁰ The new law is sure to further revolutionize public financing in California, decreasing local revenues by about \$100 million annually, according to one analyst.¹⁷¹ Local governments must also bear increased costs as a result of mandated property owner notification and election requirements.¹⁷² Also, local governments must expect to cover the costs of litigation that will arise as the new law is implemented.¹⁷³ The increase in costs at a time of decreased revenues may cause a relative funding shift away from discretionary programs toward those subject to state and federal spending mandates.¹⁷⁴ However, the full impact of Proposition 218 cannot be assessed until the terms of the law are clarified, for though "the measure is quite detailed in many respects, some important provisions are not completely clear."¹⁷⁵

The California courts have expended considerable time and resources clarifying the ambiguous terms of Proposition 13.¹⁷⁶ The analyses used in the *Richmond*, *Farrell* and *Rider* cases are most likely applicable to the interpretation of the ambiguous provisions of Proposition 218, particularly the meaning of the term "property-related fee or charge" found in section 6. The California Supreme Court stated in *Amador Valley* that similar rules of statutory construction may be used in the interpretation of similar enactments,¹⁷⁷ and the court has applied its analyses in *Richmond*, *Farrell* and *Rider* to other tax reform initiatives, most notably Proposition 62.¹⁷⁸ Although the specific terms and subject matter of the tax reform initiatives differ, Propositions 13, 62 and 218 were written with the same general purpose in mind—to provide effective property tax relief and taxpayer protection.¹⁷⁹ Furthermore, Proposition 218 was drafted with

167. CAL. STATE VOTERS PAMPHLET, *supra* note 60, at 108 (Text of Proposed Law).

168. Prop. 218, § 3; CAL. CONST. art. XIII C, § 3.

169. Prop. 218, § 4; CAL. CONST. art. XIII D, §§ 1-5.

170. Prop. 218, § 4; CAL. CONST. art. XIII D, § 6.

171. HILL, *supra* note 74, at 10-11.

172. *See id.* at 10.

173. *Officials Grapple With New Tax Levies*, L.A. TIMES, Nov. 24, 1996, at B1 (discussing lawsuit filed by L.A. City Council challenging Proposition 218).

174. *See* HILL, *supra* note 74, at 10.

175. *See id.* at 7.

176. *See generally*, *supra* Part II.

177. *Amador Valley*, 22 Cal. 3d at 245. For a discussion of the similarity between Proposition 13 and Proposition 218, *see supra*, Part I.

178. *See, e.g., Guardino*, 11 Cal. 4th at 232 & n.6 (noting the similarity of terms between the *Farrell* majority opinion and Proposition 62); *see also Rider*, 1 Cal. 4th at 15 (George, J. concurring) (applying *Rider* rule to Proposition 62).

179. *See* CAL. CONST. art. XIII C, § 1 ("Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. . . . This measure protects taxpayers. . . ."); *Guardino*, 11 Cal. 4th at 235 ("The manifest purpose of Proposition 62 as a whole

Proposition 13 case law in mind.¹⁸⁰ In understanding Proposition 218, then, it is appropriate to look at Proposition 13 and the court's construction of its terms in *Richmond*, *Farrell* and *Rider*.¹⁸¹

The remainder of this Note attempts to interpret the ambiguous terms of Proposition 218 in light of Proposition 13 jurisprudence. In particular, the Note focuses on the meaning of the term "property-related fee or charge" as found in section 6 of Proposition 218. This is a new term that was added to the tax reform lexicon with the passage of Proposition 218. Part III.A applies the more strict *Richmond/Farrell* rule of interpretation to section 6. Part III.B looks at the provision through the intent-based rule of *Rider*. In Part III.C, the Note explores reasons why an application of the *Rider* rule is appropriate.

A. Applying the *Richmond/Farrell* Rule to Proposition 218

Under the *Richmond/Farrell* analysis, where the terms of a constitutional initiative are unclear, and where such a provision imposes a supermajority requirement, the provision should be strictly construed.¹⁸² The strict construction rule could arguably apply to section 6. Section 6 includes a provision that subjects property-related fees to a vote of either "a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area."¹⁸³ Many commentators argue that section 6 is vague because the term "property-related fee or charge" lacks a clear definition.¹⁸⁴ Indeed, by coining the term "property-related fee or charge," the drafters of Proposition 218 arguably created a new category of levies not previously addressed by legislation or case law. A strict construction in line with the *Richmond* and *Farrell* decisions would look for evidence of the term's meaning in the language of the provision,¹⁸⁵ in the voter's pamphlet aids,¹⁸⁶ and finally in the meaning attributed by the Legislature.¹⁸⁷

was to increase the control of the citizenry over local taxation."); *Richmond*, 31 Cal. 3d at 201 ("The goal of Article XIII A is real property tax relief").

180. See HOWARD JARVIS TAXPAYERS ASSOCIATION, RIGHT TO VOTE ON TAXES ACT (ann.), 2 (1996) [hereinafter RIGHT TO VOTE ON TAXES ACT] (referring to *Rider*).

181. See *Guardino*, 11 Cal. 4th at 231 (stating that to understand Proposition 62, it is helpful to review Proposition 13 and the case law construing it).

182. *Richmond*, 31 Cal. 3d at 205.

183. Prop. 218, § 4; CAL. CONST. art. XIII D, § 6(c).

184. See HILL, *supra* note 74, at 18-19. See also Michael Coleman, *Living with Proposition 218* 5-7 (1996) (discussing various definitions of the term "property-related fee" by practitioners).

185. See *Richmond*, 31 Cal. 3d at 205.

186. See *id.* at 205-06.

187. See *id.* at 206.

This analysis begins with a look at the language of the provision. Section 6 defines property-related fees or charges as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as *an incident of property ownership*"¹⁸⁸ and specifically exempts particular classes of fees, such as development impact fees¹⁸⁹ and electrical or gas service fees.¹⁹⁰ "Property ownership" itself is deemed "to include tenancies of real property where tenants are directly liable to pay the assessment, fee or charge in question."¹⁹¹ The provision thus applies to both absolute¹⁹² and qualified ownership.¹⁹³ The initiative, however, provides no guidance as to what it means for a tax or levy to be imposed as an "incident" of property ownership.¹⁹⁴ Given the myriad local government levies that are in some way connected to property ownership, this omission renders the term "property-related fee or charge" ambiguous. Would such a definition apply to service-related fees that are connected in some manner with the use of property but are defined by the level of service provided?¹⁹⁵ Would it apply to regulatory fees?¹⁹⁶ Each of these types of charges or fees are associated with the possession or use of property, but the connection is compound, resulting from usage of service as well as ownership or usage of property. Where ownership or use of property is but one of the factors determining imposition of a levy, application of Proposition 218 turns on which of the many common definitions of the term "incident" is chosen.¹⁹⁷

The next step in the *Richmond/Farrell* analysis involves a consideration of the voter's pamphlet.¹⁹⁸ The "Analysis by the Legislative Analyst" [hereinafter the "Analysis"], printed in the November 1996 voter's pamphlet, further clarifies the meaning of the term "property-related fee

188. CAL. CONST. art. XIII D, §§ 2(e) and 4 (emphasis added).

189. See CAL. CONST. art. XIII D, § 1(b).

190. See CAL. CONST. art. XIII D, § 3(b).

191. CAL. CONST. art. XIII D, § 2(g).

192. See CAL. CIV. CODE § 679.

193. See CAL. CIV. CODE § 680.

194. Although neither the initiative itself nor the California Civil Code provide clear guidance as to the meaning of "incident," a common meaning of the term as used in Proposition 218 would be to "denote[s] anything which inseparably belongs to, or is connected with, or inherent in, another thing." BLACK'S LAW DICTIONARY 762 (6th ed. 1990). A more liberal definition includes "anything which is usually connected with another, or connected for some purposes, though not inseparably." *Id.* Proposition 218 does give a further hint as to the full meaning of the term, stating that "[r]eliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article." CAL. CONST. art. XIII D, § 6(b)(5).

195. Such fees would include water, sewage and garbage collection fees that vary by use.

196. For example, would rent control administrative fees be included?

197. See *supra* note 194.

198. See *Richmond*, 31 Cal. 3d at 205-06.

or charge.”¹⁹⁹ In its introduction to the proposition, the Analysis states that the measure “would constrain local governments’ ability to impose fees, assessments, and taxes.”²⁰⁰ The Analysis states that local governments “charge fees to pay . . . for services to property”²⁰¹ and concludes that the proposed requirements for property-related fees “would require local governments to reduce or eliminate some existing fees. Unless local governments increased taxes to replace lost fee revenues, spending for local public services likely would be decreased.”²⁰²

The Analysis offers some support for the view that the provision contemplates only service-related fees, such as water, sewer and refuse collection charges.²⁰³ Regulatory fees, imposed for the purpose of maintaining administrative oversight of property use, probably would not come within this definition since they are not specifically connected with providing public services. One commentator, espousing a “service-provision” definition, asserts that the criteria should be whether a fee is imposed on all identified parcels, “whether or not a request for service is made and regardless of the level or amount of service used.”²⁰⁴ This definition would specifically exclude fees that are contingent upon usage of property-related services. A sewage hookup fee would thus be included in the definition of “property-related fee” while monthly sewage treatment charges that vary with volume of sewage would not.

B. Applying the *Rider* rule to Proposition 218

In *Rider*, the California Supreme Court based its interpretation of the ambiguities of section 4 of Proposition 13 on the probable intent of the drafters of the initiative.²⁰⁵ The *Rider* court considered the history of California tax reform initiatives and read the terms of section 4 in that context. The court thus presumed that the drafters of Proposition 13 would have intended to include within the voter oversight provisions of section 4 any levy intended by the levying agency to defeat tax reform, the primary goal of that law.²⁰⁶ Under the new intent-based rule, a court may examine not only the fiscal characteristics of a tax but also the legislative purpose underlying new levies. The analysis in *Guardino* was

199. See CAL. STATE VOTER'S PAMPHLET, *supra* note 51, at 73.

200. *Id.*

201. *Id.*

202. *Id.*

203. See *id.*

204. League of California Cities, LIVING WITH PROPOSITION 218 7 (1996) (Janet R. Morningstar commenting).

205. See discussion *supra* at notes 137-152 and accompanying text.

206. See *id.*

consistent with *Rider* in that the court looked to the historical context of Proposition 62 to give meaning to the terms of that law.²⁰⁷

In looking at the terms of Proposition 218, it is important to recognize the context in which that initiative was drafted. As noted above, Proposition 218 is the latest effort in a line of constitutional and statutory initiatives aimed at providing effective property tax relief to the citizens of California. Local governments have responded to the success of the tax reform movement by shifting the portion of local revenues to both taxing and nontaxing levies that avoid the supermajority requirements of Proposition 13. Proposition 218 itself notes, "local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that . . . frustrate the purposes of voter approval of tax increases."²⁰⁸ The measure thus seeks to "protect[] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent."²⁰⁹ Understanding the long history of legislative circumvention that afflicted earlier tax reform initiatives, it is most probable that the drafters of Proposition 218 intended the initiative to provide a comprehensive law that would inhibit the ability of local governments to avoid taxpayer oversight.

The terms of Proposition 218 address the types of levies that local governments have used in the past to frustrate the purpose of voter approval. Section 3 applies the intent-based *Rider* rule to local tax levies.²¹⁰ Section 4 of Proposition 218 addresses assessments, one form of nontaxing revenue that experienced "explosive growth" in the aftermath of Proposition 13.²¹¹ The new law imposes stricter requirements on the levying of assessments,²¹² and significantly impairs the ability of local governments to circumvent voter oversight by reliance on this type of revenue source.

When viewed in the context of Proposition 13 and subsequent case law and together with sections 3 and 4 of Proposition 218, the probable intent of section 6 becomes more clear. The drafters of Proposition 218 were certainly aware that local governments would most likely respond to the restrictions imposed by sections 3 and 4 by increasing their reliance

207. See *Guardino*, 11 Cal. 4th at 235-36.

208. Prop. 218, § 2; CAL. CONST. art. XIII C § 1.

209. *Id.*

210. RIGHT TO VOTE ON TAXES ACT, *supra* note 180, at 2 ("This reinforces language of *Rider v. San Diego* dealing with special taxes: The key is the purpose of the funding, not the name of the bank account.").

211. TEN YEAR RETROSPECTIVE, *supra* note 1, at 24.

212. Prop. 218, § 4; CAL. CONST. art. XIII D, § 4 (requiring engineer's reports to be conducted by licensed engineers, mandating mailed notice of assessments and requiring passage of assessments by a majority of votes weighted according to the proportional financial obligation of the affected property).

on nontaxing, non-assessment revenue sources not subject to the restrictions imposed by those provisions. In fact, it is precisely that sort of legislative circumvention of previous tax initiatives that brought about Proposition 218. It would thus make sense to read section 6 in its broadest terms, viewing the term "property-related fee or charge" as a residual category that is defined more in terms of legislative intent rather than labels that may be manipulated by local governments. Thus, section 6 should not be read as creating a new, discrete category of revenue sources. Instead, section 6 should include any levy imposed on the property owner, or the tenant of real property directly liable to pay such levy, to raise funds to replace revenue lost by reason of the restrictions of Proposition 13, Proposition 62 and Proposition 218. This may be called the "legislative-intent definition."

At first glance, such a definition may seem to be a significant expansion of the scope of voter oversight. Indeed, the legislative-intent definition would broaden the categories of levies susceptible to a challenge under Proposition 218, including all forms of levies that are imposed on the owners of real property as broadly defined in Proposition 218.²¹³ This means that, in addition to the fees includable under the *Richmond/Farrell* analysis discussed above,²¹⁴ usage-related fees and regulatory fees would potentially come under the auspices of voter oversight.

In fact, such a legislative-intent definition would apply to only a small portion of the fees presently levied by local governments.²¹⁵ To successfully challenge a fee or charge, a taxpayer would have to show a relationship between the imposition or increase of a particular levy and the voter oversight provisions of the tax reform initiatives. As the court in *Rider* noted, "marshalling such evidence of intentional circumvention may be difficult."²¹⁶ In addition, relatively few of the fees imposed prior to Proposition 218 would likely come within section 6 because limitations on assessments imposed by section 4 of Proposition 218 had not gone into effect when those fees were enacted.

213. Proposition 218 includes within the definition of "property ownership" tenancies of real property where tenants are directly liable to pay the assessment, fee or charge in question. CAL. CONST. art. XIII D, § 2(g).

214. See *supra* notes 198-204 and accompanying text (discussing a service-related definition of property-related fees).

215. See LIVING WITH PROPOSITION, 218 *supra* note 204, at 6-8 (discussing the extent to which fees would be included in an intent-based definition of property-related fees).

216. *Rider*, 1 Cal. 4th at 11-12. In order to overcome such difficulties, the Court ruled that such intent may be inferred where a new taxing agency is "essentially controlled" by one or more cities or counties that otherwise would have had to comply with the supermajority provision of section 4 [of Proposition 13]. *Id.* at 11 (emphasis in original). The task of proving legislative circumvention under Proposition 218 would be significantly eased with a similar rule of inferred intent.

The most important aspect of the legislative intent definition is that it would effectively prevent the growth of new fees to replace tax revenues lost under the provisions of Proposition 218. Defining a property-related fee or charge in terms of the purpose behind the levy avoids the pitfalls associated with a complicated and confusing taxonomic law in favor of a catch-all provision that prevents legislatures from attempting to circumvent other voter-approval provisions with superficial changes in their financing structures. An intent-based definition of section 6 is a "practical common-sense construction" that would meet "changed conditions and the growing needs of the people."²¹⁷

C. Application of the *Rider* rule is appropriate here

There are, then, at least two competing approaches to interpreting the terms of section 6 of Proposition 218. Under the *Richmond/Farrell* rule, because section 6 imposes a supermajority voter oversight requirement, the law should be strictly construed. Where terms are ambiguous, they should be interpreted as narrowly as possible, consistent with the evident purpose of the law. The *Rider* rule employs a more liberal analysis and allows courts to infer the probable intent of a law's drafters. In the context of California's tax reform initiatives, the California Supreme Court has consistently found that the drafters and voters intended to thwart legislative circumvention. The question remains as to which of these rules should apply to section 6.

The terms of section 6 are more appropriately analyzed under the *Rider* rule. Application of the *Richmond/Farrell* rule would be appropriate if circumstances changed so as to make the definition of the drafters' probable intent highly speculative, or if the intent of the framers of section 6 was truly ambiguous. Here, however, several factors combine to make the probable intent of the framers of section 6 relatively clear.

First, the terms of the proposition itself point towards a more liberal construction. Clause 5 of the initiative states that "[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent."²¹⁸ This clause was included by the drafters of the initiative "to ensure that, in the event of any ambiguity, that the rights of the taxpayers will be paramount."²¹⁹ In construing the words of Proposition 218 to discern its purpose, the provisions of section 6 and clause 5 should be read together.²²⁰

217. *Amador Valley*, 22 Cal. 3d at 245.

218. Prop. 218, § 5; CAL. CONST. art. XIII C § 1.

219. See RIGHT TO VOTE ON TAXES ACT, *supra* note 180, at 14.

220. See *Farrell*, 32 Cal. 3d at 47, 54 (noting that "every word [of a law] should be given some significance, leaving no part useless or devoid of meaning.").

Second, a consideration of some of the supporting materials drafted by the framers of Proposition 218 manifest an intent that *Rider* be applied to the initiative. The "annotated version" of Proposition 218, written before the election and published by the Howard Jarvis Taxpayers Association, specifically refers to the *Rider* decision several times.²²¹ It states, for example, that sections 1 and 2 of Proposition 218 "reinforce[] the language of *Rider v. San Diego*."²²² Although there is no specific mention of the *Rider* decision in the annotations to section 6, the framers of Proposition 218 clearly had that decision in mind when they drafted the initiative. Section 6 was meant to prevent "circumventing taxpayer protections by manipulating the label of the levy."²²³

Finally, the history of the provision itself, along with the probable effect of a strict construction, are both factors that weigh in favor of applying the *Rider* rule here. When Proposition 218 is viewed in the context of the ongoing process of increasing voter oversight of local government revenues, an application of *Rider* makes more sense. "After voters passed Proposition 13, politicians created a loophole in the law that allows them to raise taxes without voter approval by calling taxes 'assessments' and 'fees.'"²²⁴ Proposition 218 was a response to this dynamic.²²⁵ Whereas court decisions such as *Richmond* and *Farrell* had previously elevated the form of levies over their substance, the framers of Proposition 218 wanted to avoid taxonomic circumvention of voter oversight by the legislature. Such an effort can only be achieved under the dynamic construction rule of *Rider*.

IV. Conclusion

This Note attempts to clarify the provisions of the latest of the California constitutional initiatives extending voter oversight to an ever-widening range of local government actions. Part I recounted the history of such initiatives, from Proposition 13 to the recently passed Proposition 218, and argued that each of the successive laws were interrelated with their predecessors. Part II examined the California Supreme Court's analysis of the provisions of Proposition 13, noting that two standards co-exist for the construction of supermajority provisions. Finally, Part III attempted to apply the Proposition 13 case law to the ambiguous provisions of Proposition 218, specifically section 6. The Note concluded that

221. See RIGHT TO VOTE ON TAXES ACT, *supra* note 180, at 2.

222. *Id.*

223. *Id.* at 11.

224. CAL. STATE VOTER'S PAMPHLET, *supra* note 47, at 76 (Argument in Favor of Proposition 218).

225. See RIGHT TO VOTE ON TAXES ACT, *supra* note 213, at 11.

the more liberal *Rider* rule is appropriate for giving meaning to the elusive terms of that law.

The recent history of California's taxpayer revolution can be seen as an attempt to put substance over form. In *Rider*, the California Supreme Court recognized that a strict adherence to the artificial categorization of government levies is an invitation to strategic behavior on the part of local governments. The voters of California recognized this fact with the passage of Proposition 218. Only by giving the terms of that law their fullest possible meaning can the courts avoid endless re-interpretation as legislatures superficially conform their actions to the latest court opinion. The purpose of Proposition 13 and Proposition 218, to provide effective tax relief, will never be realized without recognizing the dynamics and accounting for changes in legislative behavior caused by the enactment of such laws.

